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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 797

ALBERT WESTON and LIONEL WESTON,
Petitioners,

vs.

NEW JERSEY STATE BOARD OF OPTOMETRISTS,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Adams Press Corp., 11 Commerce Street, Newark, N. J.—Market 3-8611-12

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Opinion Below

The opinion of the Supreme Court of New Jersey is reported at 36 N. J. 258, 176 A. 2d 479 (1961).

Statement of Grounds of Jurisdiction

Petitioners seek to establish a jurisdiction, 28 U.S.C.A. (1257(3). Respondent contends that they have asserted no right, privilege or immunity subject to protection under Federal Law.

Questions Presented

1. Should this Court grant a writ of certiorari to review an administrative rule which defines a minimum optometric examination in view of the established authority of *Williamson* v. *Lee Optical of Oklahoma*, 348 U. S. 483 (1955) and *Semler* v. *Oregon State Board of Dental Examiners*, 294, &c, 608 (1935), which hold that a state may regulate the practice of professions in the exercise of its police power?

2. Is due process violated by a rule setting forth the minimum examination to be given a patient by a licensed optometrist, where the examination is within the competence of the optometrist and the rule has been upheld by the state courts as a valid and reasonable exercise of the state's right to regulate the practice of optometry?

Counter-Statement of the Case

This brief is submitted in opposition to a petition for writ of certiorari to the Supreme Court of New Jersey by the petitioners, Albert Weston and Lionel Weston, licensed optometrists of the State of New Jersey. In 1954 the legislature of the State of New Jersey enacted N.J.S.A. 45:12-11(v) which provides:

> "Prior to prescribing for or providing eyeglasses or spectacles a complete minimum examination shall be made to determine the correct lenses necessary for such a patient. The requirements of such minimum examination shall be defined by rule or regulation of the New Jersey State Board of Optometrists."

The practice of optometry has been adjudicated by the New Jersey Supreme Court as a profession vested with a great public interest. *Abelson's, Inc.* v. *New Jersey State Board of Optometrists*, 5 N. J. 412, 75 A. 2d 867, 22 A. L. R. 2d 929 (1950).

Pursuant to the legislative mandate, the New Jersey State Board of Optometrists adopted Rule 8 defining a complete minimum examination. The elements of Rule 8 are set forth at page 4 of the petition. In June 1959, complaints were filed against the petitioners charging violations of Rule 8 for failing to perform the requisite examinations. The matter was initially heard before the Board of Optometrists wherein testimony was heard in each case from a witness for the Board who was also a licensed Optometrist. In each case a licensed optometrist testified that he had visited one of the petitioners seeking care of his eyes (A37a-20; A85a-19). In both cases the examinations conducted by the petitioners did not comport with the minimum requirements set forth in Rule 8 (A39a-39; A90a-33). The Board then considered expert testimony. The expert for the Board stated that all of the examinations set forth in the Rule were necessary for a minimum examination (A112a-35 to A119a-34) and that such an examination could indicate pathological findings indicative of other serious conditions (A119a-35). The petitioners' expert conceded that 7 of the tests were necessary and at least 5 others would be advisable under certain conditions (A168a-18). He also conceded that a minimum rule should be established for the protection of the public in optometric examinations (A224a-16). The petitioners were found guilty and their licenses were suspended for a period of two months (A13a-28; A24a-11). This determination was appealed to the Superior Court of New Jersey, Appellate Division, and while pending in that Court, certified by the Supreme Court of New Jersey in accordance with New Jersey practice. The Supreme Court of New Jersey, prior to its decision, directed that additional testimony be taken concerning the validity of Rule 8 and whether that Rule had been enforced in a discriminatory manner. A second hearing was held before a Judge of the Superior Court of

New Jersey wherein it was stipulated that the petitioners' charge of discrimination would be dismissed and the suspensions against the petitioners vacated (Tr. 293). Therefore, the remaining sole question then presented to the Court was the validity of Rule 8.

At this hearing the petitioners presented two expert witnesses in addition to the one who had testified before the Board. The second expert, Dr. Fonda, testified that he performs 8 of the tests set forth in Rule 8 as part of his examination (Tr. 134-1; Tr. 134-2; Tr. 134-3; Tr. 134-7; Tr. 140-5; Tr. 137-7; Tr. 136-2; Tr. 134-15; Tr. 134-20) and another one under certain circumstances (Tr. 136-18). The third witness, although finding not all the tests required by Rule 8 as necessary, conceded that the full examination could determine pathological abnormalities and a variety of diseases of the eye or of the nerve connection of the eye (Tr. 490-17). The two experts presented on behalf of the Board testified that the requirements of Rule 8 constituted the minimum examination necessary in prescribing for eyeglasses and detecting any abnormalities. They further indicated that there were other tests in addition to those set forth in the Rule which could be performed. The Trial Court held that the Rule was in the best interest and for the protection of the public and constituted a reasonable exercise of the authority delegated by the Legislature to the State Board of Optometrists.

The matter was then returned to the Supreme Court of New Jersey which held that the statute regulating the practice of Optometry was to be considered in its entirety, and that the Rule promulgated thereunder was a valid exercise of that authority. Petitioners did not contest the validity of the statuory provision auhorizing the Rule, but rather limited their appeal to the issue of the validity of the Rule upon the grounds that it required certain tests which were

not necessary to prescribing correct lenses. This, they claim, usurps the professional judgment of the practicing Optometrist. The New Jersey Supreme Court adopted as its rationale the presumption that the Rule was reasonable, and held that the petitioners failed to prove to the contrary. The Court emphasized that it was in the public interest to maintain the Rule and held that the Rule did not limit optometrists in their right to exercise their profession, but simply required them to exercise "most carefully their professional abilities for the benefit of their patients".

ARGUMENT

POINT I

The promulgation of a rule requiring a minimum examination to be performed by optometrists does not present a substantial federal question for review by this Court.

It has long been the rule of law established by this Court and conceded by the petitioners that professions such as Optometry may be regulated. *Williamson* v. *Lee Optical of Oklahoma*, 348 U. S. 483 (1955); *Semler* v. *Oregon State Board of Dental Examiners*, 294 U. S. 608 (1935). In the former case, the Court was faced with the validity of an Oklahoma statute which required opticians to have a prescription for all lenses which they ground and prevented them from prescribing directly for the public. This Court held that such restriction upon opticians was a valid exercise of the police power by the State of Oklahoma and did not constitute an abuse of procedural due process. The latter case, *Semler*, involved an Oregon statute which regulated the dental profession and prohibited advertising. Once again this court determined that the legislature of Oregon was acting validly in protecting the public against

unwarranted and misleading claims. The petitioners do not now nor did they in the Supreme Court of New Jersey question the validity of N.J.S. 45:12-11(v), and one of their experts espoused the need for such regulation in the optometry profession. Moreover, petitioners make no attack on the delegation by the Legislature to the State Board of Optometrists to define and enforce the statutory provision. The crux of their petition is that the Rule 8 promulgated by the Board upon the authority of the statute requires examinations of the eye which might be unnecessary in a particular case. Petitioners contend that the Rule usurps the exercise of the individual optometrist's judgment to make a less extensive examination and violates his right to procedural due process. Petitioners' argument is manifestly erroneous in view of the above cited cases.

The criterion by which the rule must be judged is that which was applied by the Suprerior Court of New Jersey and the Supreme Court of New Jersey, that is, whether the regulation is reasonable. As the New Jersey Supreme Court clearly stated, the rule of the agency is presumed to be valid, and the burden is on the petitioners to show its unreasonableness. The most that can be said for the petitioners' proofs on this issue is that some optometrists may, under certain circumstances, consider one or more of the tests required by Rule 8 unnecessary and that the performance of "unnecessary" examinations is a burden upon them in their practice.

Although petitioners' experts did not find that all the tests required by Rule 8 were necessary in each examination, they were in agreement that each of the tests were directly related to the condition of the eye and, if performed, might serve to determine the existence of underlying conditions. Dr. Plain, petitioner's expert witness, referring to the visual fields confrontation test said "This

is the test which very often shows up the first sign of a brain tumor, the first signs of some lesions in the optic nerve pathway or in the pituitary region and sometimes glaucoma (A164a-23). Moreover, as the Trial Court determined, a licensed optometrist of the State of New Jersey is qualified to perform each and every one of the tests (A30a). Thus it cannot be contended that any of the requirements of the rule are either frivolous, arbitrary, or beyond the competency of an optometrist. Petitioners' sole argument is that it should be the prerogative of the optometrist to determine the necessity of each test in each case. Such a position collaterally attacks the statutory authority for a minimum examination which the experts conceded was necessary. The fact that the performance of one or more of the tests, such as color vision, might prove unnecessary in most cases is not such a burden as to make the rule unreasonable. As this Court pointed out in *Sproles v. Binford*, 286 U. S. 374 (1931) at page 388 "When the subject lies within the police power of the State, debatable questions as to reasonableness are not for the courts but for the Legislature, which is entitled to form its own judgment and its action within its range of discretion cannot be set aside because compliance is burdensome." See *Graves v. Minnesota*, 47 Sup. Ct. 122, 123 (1926).

The Legislature of the State of New Jersey, in enacting N.J.S. 45:12-11(v), sought to protect the public from inadequate and cursory examination of a vital and sensitive organism, the eye. In its statement prefacing the bill, the purpose was "[T]o enforce ethical and professional practice in the interests of public health and welfare by an added listing of causes for revocation or suspension of licenses". Obviously, there will always be some dissent to the requirements of such a rule. It is interesting to note that both Doctors Plain and Fonda for the petitioners agreed that tests 1, 2, 4, 6, 7 and 9 were required for a

minimal examination. The witness for the Board, in testifying as to the examination conducted by Lionel Weston upon him found that this petitioner did not comply with all the requirements of the Rule and particularly numbers 1, 2 and 4 of the Rule, which their experts conceded to be necessary. In the case of Albert Weston, said petitioner did not comply with numbers 2 and 4 of the Rule, also conceded by his expert as necessary. Clearly, petitioners did not even comply with the minimum requirements set up by their own experts. There can be no doubt, therefore, that where a divergence of opinion exists among individual practitioners, that the Board was acting within its authority in prescribing minimum examinations directly related to the health of the eye. The necessity for minimum examination standards is evidenced by the petitioners' perfunctory treatment of persons whom they examined. This supports the contention that the Rule is a valid exercise of the police power and in no way constitutes a violation of petitioners' right to procedural due process.

The Court of Errors of Connecticut, in the case of *Amsel* v. *Brooks;* 141 Con. 288, 106 A. 2d 152 (Ct. of Errors 1954), was confronted with a statute intended to curtail the operation of dental laboratories. Prior to the amendment of the dental regulation statute, dental laboratories were free to deal with the public in the fitting and repair of prosthetic appliances for the mouth. The amended statute required such dental laboratories to deal only through and under the supervision of a licensed dentist. The plaintiff sought to enjoin the enforcement of the Act on the grounds that it violated his constitutional rights. The Court of Errors of Connecticut found the Act constitutional as a valid regulation under the police power despite the fact that it, in effect, dictated a method of practicing their profession. An appeal was taken to this Court which was dismissed for lack of a federal question, 75 Supreme Court 125 (1954). In the same sense, there is no federal question presented in this petition.

POINT II

The alleged absence of similar regulations in other professions cannot be considered a basis for upsetting Rule 8 as unconstitutional.

Petitioners on several occasions seek to draw analogies between their profession and the legal and medical professions. In drawing such comparisons they allege that the professional judgment in those occupations are not regulated, and, therefore, that the judgment of the optometrist should not be subject to positive rules. This argument was projected in both the *Williamson* case and the *Semler* case, *supra*. In *Semler*, Chief Justice HUGHES held at 294 U. S. 610 "Nor has plaintiff any ground for objection because the particular regulation is limited to dentists and is not extended to other professional classes. The State was not bound to deal alike with all these classes or to strike at all evils at the same time or the same way. It could deal with different professions according to the needs of the public in relation to each."

In the *Williamson* case the court held at 348 U. S. 489 "The problem of legislative classification is a perennial one, admitting of no doctrinaire definition. Evils in the same field may be of different dimensions and proportions requiring different remedies".

Petitioners seek to impress upon the court that this is an issue of novel impression since the State is prescribing the judgment to be used by an optometrist. This theory seeks to convert a common situation into an unusual case, calling for this court's exercise of discretion. Actually such is not the case. The Rule is in no way a substitute for the exercise of professional judgment by an optometrist. There is a clear distinction between the examination on the one hand and the diagnosis and treatment on the other.

The rule simply requires the optometrist to perform all the minimum tests necessary for a thorough examination to protect the public. It does not dictate in any sense the course of action to be taken by the optometrist once he has made his findings based on such an examination. Manifestly, where such a minimal examination may reveal serious underlying conditions, the Legislature can require a professional, such as an optometrist, whose field is limited to one specific organism, to make such minimum tests. Petitioners, in their Reason No. 3, page 14, assert that the Supreme Court of New Jersey misconstrued the issue and that an administrative agency may regulate only to the point of prohibiting unreasonable conduct. Respondent submits that the failure to perform the minimum examination would, under this doctrine, constitute unreasonable conduct. The analogy drawn as part of that argument once again exhibits petitioners' failure to distinguish between examination and treatment. Whether surgery or chemotherapy is the best treatment for cancer is a matter for professional judgment. Likewise, whether a patient needs single lenses or bifocal glasses is a matter for the judgment of the optometrist.

Finally, petitioners' argue that the statute and rule do not permit an optometrist to show that a test required by Rule 8 is unnecessary in a particular case. The effect of such an argument is once again to substitute the individual petitioner's determination of what are minimum examination standards for that which has been prescribed by the Board. This would negate the intention of the Legislature. This Court in the *Semler* case, *supra*, denied such a claim and stated at 294 U. S. 612 "In framing its policy the Legislature was not bound to provide for determinations of the relative proficiencies of particular practitioners. The Legislature was entitled to consider the effects of the practices which it described, and if these effects were injurious

in facilitating unwarranted and misleading claims, to counteract them by a general rule even though in particular instances there might be no actual deception or misstatement".

CONCLUSION

We respectfully submit that this Court should deny the petition for certiorari.

Respectfully submitted,

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